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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

BERNARD PARRISH, BOB
GRANT, ROY LEE JEFFERSON,
WALTER BEACH, DR. CLINTON
JONES, WALTER ROBERTS, III,
CLIFTON MCNEIL, MARVIN
COBB, JOHN BRODIE, CHUCK
BEDNARIK, AND PAUL
HORNUNG on behalf of themselves
and all others similarly situated

Plaintiffs,
vs.

MANATT, PHELPS & PHILLIPS,
LLP, and MCKOOL SMITH, PC

Defendants.

CASE NO. 3:10-CV-03200-WHA

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION
CONDITIONALLY CERTIFYING
CLASS, PRELIMINARILY
APPROVING SETTLEMENT,
AND PROVIDING FOR NOTICE
TO CLASS**

Date: January 31, 2013
Time: 8:00 A.M.
Place: Courtroom 9,
Hon. William H. Alsup

[Filed concurrently with Declaration of Maxwell M. Blecher in Support of Motion Conditionally Certifying Class, Preliminarily Approving Settlement, and Providing For Notice; and [Proposed] Order.]

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1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that on January 31, 2013 at 8:00 a.m., or as soon
 3 thereafter as it may be heard, at the U.S. District Court, Northern District of
 4 California, located at 455 Golden Gate Avenue, San Francisco, California, before
 5 the Honorable William H. Alsup, the Named Proposed Participating Class
 6 Plaintiffs Roy Lee Jefferson, Walter Beach, Clifton McNeil, John Brodie, Chick
 7 Bednarik, and Paul Hornung, the (“Named Plaintiffs”) on behalf of themselves, by
 8 undersigned counsel, will and hereby do respectfully move the Court for an order:
 9 (1) conditionally certifying the putative class pursuant to Rule 23 of the Federal
 10 Rules of Civil Procedure; (2) granting preliminary approval of a settlement
 11 between the class and Defendants described in the Settlement Agreement attached
 12 hereto; (3) directing that notice of the settlement be given to the Class; and (4)
 13 setting a schedule for final approval of that settlement.

14 This motion is based on this Notice of Motion, the accompanying
 15 Memorandum of Points and Authorities; the attached exhibits; the Declaration of
 16 Maxwell M. Blecher in Support of this motion; the [Proposed] Order; the
 17 pleadings, records, and papers on file in this action; any argument present at the
 18 hearing on this motion; and all other matters properly before this court.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 On August 12, 2012, Plaintiffs Roy Lee Jefferson, Walter Beach, Clifton
 22 McNeil, John Brodie, Chick Bednarik, and Paul Hornung the (“Named Plaintiffs”)
 23 and Defendants Manatt, Phelps & Phillips, LLP (“Manatt”) and McKool Smith, PC
 24 (“McKool,” and collectively with Manatt, “Defendants”) entered into a settlement
 25 Agreement and Release, which was the culmination of two settlement conferences
 26 before, and related communications with, Magistrate Judge Joseph C. Spero. For
 27 the following reasons, Plaintiffs respectfully request that the Court enter the
 28 Proposed Order conditionally certifying the putative class, preliminarily approving

1 the Settlement, and providing for notice to the class.

2 **II. FACTUAL AND PROCEDURAL BACKGROUND**

3 This proposed class action arises out of a prior certified and litigated class
4 action, *Adderley v. National Football League Players Inc.*, No. C 07-00943 WHA
5 (the “*Adderley Action*”), which was tried to verdict and settled while on appeal.
6 Plaintiffs filed this action on July 21, 2010, alleging that Defendants had
7 committed malpractice arising out of their representation of the Certified Class in
8 the *Adderley Action*.

9 On October 29, 2010, Defendants moved to dismiss the Complaint in its
10 entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). On December 13,
11 2010, the District Court dismissed the Complaint. Plaintiffs timely filed a Notice
12 of Appeal to the Ninth Circuit Court of Appeals. The parties fully briefed the
13 matter to the Ninth Circuit and oral argument was held on April 18, 2012.
14 Following oral argument, the parties engaged in arm’s-length negotiations on June
15 20, 2012 and July 26, 2012, with the assistance of Magistrate Judge Spero.

16 The parties’ settlement negotiations culminated in the execution of the
17 Settlement Agreement. A true and correct copy of the executed Settlement
18 Agreement is attached hereto as Exhibit 1. The Settlement Agreement provides for
19 a proposed settlement class and payment by Defendants of \$3,500,000 for the
20 settlement of all claims that have been or could have been asserted by Plaintiffs for
21 themselves or on behalf of the class. This amount has already been deposited by
22 Defendants into an escrow account. A true and correct copy of the executed
23 Escrow Agreement is attached hereto as Exhibit 2.

24 The Settlement Agreement further provides that attorneys’ fees, costs, and
25 expenses may be paid out of the Settlement Fund as defined in the Settlement
26 Agreement after Court approval. Blecher & Collins, P.C. (“Class Counsel”) will
27 request reimbursement for a portion of their attorneys’ fees, litigation costs, and
28 expenses. Class Counsel will apply to the Court for an award from the Settlement

1 Fund of approximately \$100,000 in litigation and settlement expenses and costs
 2 incurred on behalf of the Class and for attorneys' fees in an amount equal to 25%
 3 of the remaining settlement fund after deduction of the amount that the Court
 4 awards for the litigation and settlement expenses and costs that Class Counsel
 5 incurred on behalf of the Class. All costs, fees, and expenses will be paid solely
 6 out of the Net Settlement Fund, as defined in the Settlement Agreement, and in
 7 accordance with the Plan of Distribution, as approved by the Court. The Proposed
 8 Plan of Distribution divides the Net Settlement Amount on a per year basis, (2003,
 9 2004, 2005, and 2006), in what Class Counsel understands to be the same
 10 percentage as the Court ordered and approved in the *Adderley* Action. The
 11 Proposed Plan of Distribution is attached hereto as Exhibit 3.

12 In exchange, each Class Member will release the Defendants and their
 13 Releasees from any and all claims and causes of action, whether known or
 14 unknown, that arise out of the facts, occurrences, transactions, or other matters that
 15 were alleged in, are the subject of or relate to the present action, whether under
 16 federal or state law, as set forth in more detail in the Settlement Agreement.

17 **III. THE PUTATIVE CLASS SHOULD BE CONDITIONALLY**
CERTIFIED FOR SETTLEMENT PURPOSES ONLY

18 Plaintiffs seek certification of one class – the Participating Class – for
 19 settlement purposes only. *See* [Proposed] Order, filed concurrently herewith, ¶ 2.
 20 This class is defined as:

21 All persons who were members of the certified class in
 22 the action styled *Adderley v. National Football League*
 23 *Players Incorporated, et al.*, No. C 07-00943 WHA and
 24 who did not opt out of that class, including each of the
 25 named Plaintiffs. The proposed Settlement Class shall
 26 also include all persons who, by operation of law or
 27 otherwise, including, but not limited to, by assignment,

1 rights of survivorship, marriage, domestic partnership,
 2 devise, agency, affiliation, or subrogation, own or have
 3 the right to enforce any portion of any of the claims
 4 brought in the present action by or on behalf of any
 5 person in the Settlement Class.

6 Federal Rules of Civil Procedure 23(a) and 23(b) govern the certification
 7 inquiry for settlement only classes. *See Amchem Prods., Inc. v. Windsor*, 521 U.S.
 8 591, 620-21, 117 S.Ct. 2231, 2248-49 (1997). The District Court must find that a
 9 class satisfies the requirements of Rule 23 before analyzing whether a proposed
 10 class settlement is fair. *See id.* The District Court may take the proposed
 11 settlement into consideration when examining the question of certification. *See id.*

12 The requirements of Rules 23(a) and (b) are designed to ensure that a
 13 proposed class has “sufficient unity so that absent class members can fairly be
 14 bound by decisions of class representatives.” *Id.* at 620, 117 S.Ct. at 2248. In
 15 order to be certified, a class must satisfy the four requirements of Rule 23(a): (1)
 16 numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.
 17 *See Fed. R. Civ. P. 23(a).* If the Rule 23(a) criteria are satisfied, the Court must
 18 also find that the class fits within one of the three categories of class actions
 19 defined in Rule 23(b). In this case, Plaintiffs sought class certification under Rule
 20 23(a), (b), and (d). *See Complaint (“Compl.”) ¶ 35.*

21 As discussed below, the putative settlement class satisfies the requirements
 22 of Rule 23(a). This class is virtually identical to the class that was certified in the
 23 *Adderley Action*. The proposed settlement class should therefore be conditionally
 24 certified for settlement. As noted, however, Plaintiffs seek conditional certification
 25 of the settlement class for settlement purposes only, and Defendants have agreed
 26 not to oppose certification solely for purposes of settlement.

27 ///

28 ///

1 **A. The Rule 23(a) Criteria**

2 1. Numerosity

3 The court must find that the class is “so numerous that joinder of all
 4 members is impracticable.” Fed. R. Civ. P. 23(a)(1). Plaintiffs allege that the
 5 proposed class consists of 2,062 former National Football League (“NFL”) players
 6 who were previously certified as a class in the *Adderley* Action. *See* Compl. ¶ 37.
 7 Joining all of these potential claimants in the lawsuit would be impracticable and
 8 inefficient. Moreover, in light of the settlement, there is no reason to undertake
 9 such joinder because the Settlement Agreement sets forth an orderly and efficient
 10 manner for resolving the claims of all of the potential class members. As a result,
 11 the number of potential class members weighs in favor of certification of the
 12 settlement class for settlement purposes. *See Collins v. Cargill Meat Solutions*
 13 *Corp.*, 274 F.R.D. 294, 300 (E.D. Cal. 2011); *Gomez v. Rossi Concrete, Inc.*, 270
 14 F.R.D. 579, 588 (S.D. Cal. 2010); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625,
 15 632 (S.D. Cal. 2010); *In re Cooper Cos. Inc. Secs. Litig.*, 254 F.R.D. 628, 634
 16 (C.D. Cal. 2009).

17 2. Commonality

18 The commonality prong of Rule 23(a) asks whether “there are questions of
 19 law or fact common to the class.” This is a low standard that is to be construed
 20 liberally by the courts. *See In re Nat'l W. Life Ins. Deferred Annuities Litig.*, 268
 21 F.R.D. 652, 661 (S.D. Cal. 2010); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 655
 22 (C.D. Cal. 2000). If there is just one issue of law or fact shared by the members of
 23 the putative class, then the commonality test is met. *See Rodriguez v. Hayes*, 591
 24 F.3d 1105, 1122-23 (9th Cir. 2010); *Cole v. Asurion Corp.*, 267 F.R.D. 322, 326
 25 (C.D. Cal. 2010).

26 Plaintiffs assert that the following legal and factual issues are common to the
 27 proposed classes: (1) whether Defendants’ failure to admit critical evidence in the
 28 underlying action fell below the standard of care and constituted legal malpractice

1 and breach of fiduciary duty resulting in damage to the members of the
 2 Participating Class; (2) whether Defendants' failure to present a plausible damages
 3 theory for Plaintiffs claims for breach of fiduciary duty fell below the standard of
 4 care and constituted legal malpractice and/or breach of fiduciary duty resulting in
 5 damage to the Participating Class; and (3) whether the Participating Class is
 6 entitled to damages, punitive damages, costs, and attorneys' fees as a result of the
 7 conduct of Defendants. *See Compl.* ¶ 42(a)-(c).

8 Defendants agree, for settlement purposes only, the Plaintiffs' allegations
 9 describe some legal and factual issues common to the proposed class.
 10 Accordingly, the commonality requirement of Rule 23(a) favors certification of the
 11 settlement class for settlement purposes.

12 3. Typicality

13 The typicality prong of Rule 23(a) asks whether "the claims or defenses of
 14 the representative parties are typical of the claims or defenses of the class."
 15 Plaintiffs allege that the Named Plaintiffs were members of the class certified in
 16 the *Adderley* action. *See Compl.* ¶¶ 36-37. The relief Plaintiffs seek is the same
 17 for both the Named Plaintiffs and the proposed class. *See id.* ¶¶ 42(a)-(c), and
 18 Prayer for Relief. As a result, the claims of the Named Plaintiffs are typical of the
 19 claims of the proposed class and this Rule 23(a) requirement thus favors
 20 certification of the proposed class for settlement purposes.

21 4. Adequate Representation

22 The adequate representation prong of Rule 23(a) asks whether "the
 23 representative parties will fairly and adequately protect the interests of the class."
 24 This prong encompasses two distinct inquiries designed to protect the interests of
 25 absentee class members: (1) whether the counsel representing the class is qualified
 26 to do so; and (2) whether the named plaintiffs and the class they seek to represent
 27 have conflicts of interests. *See Amchen*, 521 U.S. at 625-26 & n.20, 117 S.Ct. at
 28 2250-51 & n.20.

1 In this case, Plaintiff are represented by Maxwell M. Blecker, Howard K.
 2 Alperin, John Arbucci, and Alyson C. Decker of Blecher & Collins, P.C. Class
 3 Counsel are highly competent and experienced class action attorneys, who have
 4 over the course of decades handled numerous complex cases and class action
 5 lawsuits. *See* Declaration of Maxwell M. Blecher in Support of Motion (“Blecher
 6 Decl.”) ¶¶ 2 and 6; *see also* Fed. R. Civ. P. 23(g)(1)(C)(i) (stating that in
 7 appointing class counsel, the Court must consider counsel’s experience in handling
 8 class actions, other complex litigation, and claims of the type asserted in the action,
 9 and counsels’ knowledge of the applicable law). Moreover, Class Counsel
 10 identified Plaintiffs’ potential claims and investigated them prior to filing suit.
 11 *See* Blecher Decl. ¶¶ 2 and 6; *see also* Fed. R. Civ. P. 23(g)(1)(C)(i) (stating that in
 12 appointing class counsel, the Court must consider the work counsel has done in
 13 identifying or investigating potential claims in the action). Over the course of this
 14 case, Class Counsel have devoted substantial attorney and staff time to this action,
 15 in addition to advancing certain costs necessary to its prosecution. *See* Blecher
 16 Decl. ¶ 2; *see also* Fed. R. Civ. P. 23(g)(1)(C)(i) (stating that in appointing class
 17 counsel, the Court must consider the resources counsel will commit to representing
 18 the class).

19 Furthermore, the Named Plaintiffs and the class they seek to represent do not
 20 have any conflicts of interest. *See* Blecher Decl. ¶ 3. To the contrary, Plaintiffs
 21 allege the same claims on behalf of the Named Plaintiffs and the proposed class,
 22 and seek the same relief for the Named Plaintiffs and the proposed class. *See id.*;
 23 Compl. ¶¶ 22-30, 31-34, 42(a)-(c), and Prayer for Relief. Additionally, the Named
 24 Plaintiffs would need to establish the same facts and legal theories as the proposed
 25 class. *See* Blecher Decl. ¶ 3. Accordingly, this Rule 23(a) requirement favors
 26 certification of the proposed class for settlement purposes.

27 **B. The Rule 23(b)(3) Criteria**

28 In order to certify a class under Rule 23(b)(3), the District Court must make

1 two additional findings of predominance and superiority. *See* Fed. R. Civ. P.
 2 23(b)(3). Issues common to the class must predominate over individual issues, and
 3 the class action device must be superior to other means of handling the litigation.
 4 *See id.*

5 1. Predominance

6 The predominance inquiry asks whether questions of law or fact common to
 7 the class members predominate over any questions affecting only individual
 8 members. *See* Fed. R. Civ. P. 23(b)(3). Here Plaintiffs allege that Defendants: (1)
 9 failed to properly use critical evidence, and (2) failed to present a plausible
 10 damages theory for their breach of fiduciary duty claim. *See* Compl. ¶ 42. These
 11 are all common questions which can be resolved for all potential class members in
 12 a single adjudication. Moreover, Defendants agree, for settlement purposes only,
 13 that Plaintiffs allegations describe some legal and factual issues that could
 14 predominate over questions affecting only individual members. Accordingly, the
 15 predominance requirement of Rule 23(b)(3) favors certification of the settlement
 16 class for settlement purposes. *See Johnson v. General Mills, Inc.*, 275 F.R.D. 282,
 17 288 (C.D. Cal. 2011); *Local Joint Executive Bd. of Culinary/Bartender Trust Fund*
 18 *v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001).

19 2. Superiority

20 The superiority inquiry asks whether a class action is superior to other
 21 available methods for the fair and efficient adjudication of the controversy. *See*
 22 Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) sets out several factors relevant to the
 23 superiority inquiry: (a) the interest of members of the class in individually
 24 controlling the prosecution or defense of separate actions; (b) the extent and nature
 25 of any litigation concerning the controversy already commenced by or against
 26 members of the class; (c) the desirability or undesirability of concentrating the
 27 litigation of the claims in the particular forum; and (d) the difficulties likely to be
 28 encountered in the management of a class action.

1 Here, each of these factors supports a finding that a class settlement is
2 superior to other available methods of resolving this case. First, essentially all of
3 the individual claims are identical, yet not financially substantial, and there are
4 over two thousand potential claimants. As it would cost more than could be
5 recovered for each of these claimants to bring their claims individually, a class
6 settlement is the most logical and efficient avenue of redress for the potential class
7 members. Second, there are no similar actions pending, further indicating that
8 individuals lack a compelling interest to control the prosecution of their own
9 claims. Moreover, if litigated separately, these claims of over two thousand
10 individuals would represent a substantial potential strain on judicial resources.
11 Third, it is appropriate to litigate this case in San Francisco, as the underlying
12 *Adderley* Action was adjudicated in the United States District Court for the
13 Northern District of California. Finally, although it is probable that there will be
14 some objection to the settlement, this case is not likely to be difficult to manage as
15 a class action because the parties have already reached a settlement, membership in
16 the class is easy to determine, and the parties have previously agreed to detailed
17 procedures for the orderly and efficient administration of the settlement. As a
18 result, the superiority requirement of Rule 23(b)(3) favors certification of the
19 settlement class for settlement purposes.

20 **IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND**
21 **ADEQUATE**

22 Once the Court has concluded that a class action settlement satisfies the
23 requirements for certification under Rules 23(a) and (b), the Court must also
24 determine whether the settlement is “fair, reasonable and adequate” under Rule
25 23(e). *See Amchem*, 521 U.S. at 620, 117 S.Ct. at 2248. There are nine factors to
26 be considered when determining the fairness of a proposed class action settlement:
27 (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of
28 the class to the settlement; (3) the stage of the proceedings and the amount of

1 discovery completed; (4) the risks of establishing liability; (5) the risks of
2 establishing damages; (6) the risks of maintaining the class action through trial; (7)
3 the ability of the defendants to withstand a greater judgment; (8) the range of
4 reasonableness of the settlement fund in light of the best possible recovery; and (9)
5 the range of reasonableness of the settlement fund to a possible recovery in light of
6 all the attendant risks of litigation. *See In re Prudential Insurance Company of*
7 *America Sales Practice Litigation*, 148 F.3d 283, 317 (3rd Cir. 1998). As
8 discussed below, these factors demonstrate that the Proposed Settlement is fair,
9 reasonable, and adequate.

10 **A. The Complexity, Expense and Likely Duration of the Litigation**

11 As an initial matter, this case is inherently complex because it involves
12 claims of malpractice arising out of a litigated-to-trial class action case. Legal
13 malpractice is now a demanding and frequently-changing area of the law,
14 particularly, where, as here, the causation element of Plaintiffs' case requires the
15 trial of a case within a case. In short, the complexity of the legal claims Plaintiffs
16 assert, which will necessitate retrying the underlying *Adderley* Action, favors
17 settlement of this action. Litigating this case through trial would be a long and
18 difficult process requiring substantial expenditures of time and money by both the
19 Court and the parties. Moreover, this case has already been pending for well over
20 two years and if not settled is likely to last several more years. *See Blecher Decl.* ¶
21 4. Thus, the prospect of such a drawn out process weighs in favor of settlement.

22 **B. The Reaction of the Class to the Settlement**

23 This second factor attempts to gage whether members of the class support
24 the settlement. *See Prudential*, 148 F.3d at 318. This factor is more relevant to a
25 determination of whether a class settlement should be finally approved – rather
26 than, as here, preliminarily approved – because by the time of a final approval
27 hearing, the class members have received notice of the settlement and have been
28 able to respond. *See id.*

1 Here, the parties are solely seeking preliminary approval of the settlement
 2 and permission to provide notice of the settlement to the proposed class. Thus,
 3 other than the Named Plaintiffs, no other potential class members have received
 4 formal notice of the settlement yet and, therefore, none have responded. *See*
 5 Blecher Decl. ¶ 3 (noting that during the settlement negotiation process, only
 6 Named Plaintiff Walter Beach, who approved and supports the proposed
 7 settlement, participated). Class Counsel expects that a small fraction of class
 8 members, and non-class-member Bernard Parrish, may oppose the settlement. *See*
 9 *id.*; *see also* Ninth Circuit Order Dismissing Bernard Parrish from the Appeal and
 10 Granting Joint Motion for Limited Remand, attached hereto as Exhibit 4. Class
 11 counsel does not, however, know the reaction of the rest of the proposed class to
 12 the settlement, and that will not be known until after the settlement is preliminarily
 13 approved and notice can be provided to all the potential class members.

14 **C. The Stage of the Proceedings and the Amount of Discovery**
 15 **Completed**

16 To ensure that a proposed settlement is the product of informed negotiations,
 17 the Court may wish to review the type and amount of discovery the parties
 18 undertook prior to settlement. *See Prudential*, 148 F.3d at 319. Here, the parties
 19 exchanged initial disclosure and various documents in 2010. The parties are also
 20 familiar with the substantial trial record, post-trial record, depositions, expert
 21 reports, and voluminous document productions in the underlying *Adderley* Action.
 22 *See Blecher Dec. ¶ 5.*

23 Additionally, Class Counsel engaged the services of Karl J. Schulze, CPA,
 24 CVA, CFE, CFF of Schulze Haynes Loevenguth and Co to prepare a damage study
 25 related to Plaintiffs' claims. Mr. Schulze opined that Plaintiffs' damages in the
 26 *Adderley* Action ranged from \$12,659,000 to \$13,704,000 before interest. A true
 27 and correct copy of Mr. Schulze's damage study is attached hereto as Exhibit 5.
 28 After deducting the Jury Verdict of \$7,100,000 in the *Adderley* case, the damage

1 range applicable to the instant matter would be \$5,559,000 to \$6,604,000 before
 2 interest. *See* Exh. 5. Accordingly, the proposed settlement would appear to
 3 represent at least 50 percent of the maximum potential recovery attainable at trial
 4 for Plaintiffs.

5 **D. The Risks of Establishing Liability and Damages**

6 The fourth and fifth factors focus on the possible risks of litigation in order
 7 to balance the likelihood of success and the potential damages award if the case
 8 were taken to trial against the benefits of an immediate settlement. *See Prudential*,
 9 148 F.3d at 319. In this case, these factors weigh in favor of settlement because
 10 Plaintiffs face a triple burden: (1) prevailing in their pending appeal of this Court's
 11 order dismissing the action; (2) obtaining class certification; and (3) proving their
 12 claims at trial.

13 Although, this Court's dismissal of this action remains in place, the parties
 14 reached an agreement to settle after oral argument had occurred before a three-
 15 judge panel of the Ninth Circuit but before the panel had issued its decision. Thus,
 16 even if the dismissal were to be reversed by the Ninth Circuit, Plaintiffs would still
 17 need to obtain class certification. Plaintiffs contend that this class is capable of
 18 certification but are cognizant of Defendants' proposed bases of opposition and
 19 acknowledge that certification is not guaranteed. Furthermore, even after class
 20 certification, Plaintiffs would ultimately have to prove that Defendants committed
 21 malpractice. Any Ninth Circuit decision, if issued, would not likely provide
 22 enlightenment on the basic malpractice claim. Moreover, this case has already
 23 been dismissed with prejudice once.

24 Still, while the Plaintiffs agree that the ultimate likelihood of success at trial
 25 is uncertain, Plaintiffs contend that Defendants would, in the absence of the
 26 Proposed Settlement, have a substantial risk for damages award of a significantly
 27 larger amount. In the face of the risks of pressing this case through a decision on
 28 appeal, and if the appeal were to succeed, trial, the benefits of the proposed

1 settlement are clear. The proposed settlement provides the Class with a certain and
 2 timely recovery and protects Plaintiffs against the real possibility of no recovery at
 3 all if this case proceeds to trial.

4 **E. The Risks of Maintaining the Class Action through Trial**

5 This factor is not significant in the evaluation of settlement-only class
 6 actions because, as the Supreme Court noted in *Amchen*, 521 U.S. 620, 117 S.Ct. at
 7 2248, the proposal in a settlement-only class action is “that there be no trial.” *See*
 8 *Prudential*, 148 F.3d at 321. As a result, this factor does not affect the fairness
 9 inquiry in this settlement-only class action. Furthermore, under Rule 23, a district
 10 court may decertify or modify a class at any time during the litigation if it proves
 11 to be unmanageable.

12 **F. The Ability of the Defendants to Withstand a Greater Judgment**

13 Defendants might be able to withstand a judgment greater than the agreed
 14 settlement amount of \$3,500,000, but Defendants’ possible ability to do so does
 15 not affect the fairness of the proposed settlement. To the contrary, after extensive
 16 arm’s-length negotiations before Magistrate Judge Spero, and coupled with the
 17 analysis by Plaintiffs’ damage expert, the parties agreed that this multi-million-
 18 dollar settlement represents a fair and reasonable settlement when weighed against
 19 the risks of litigation and time/money considerations of all the parties involved.
 20 The settlement relieves Defendants of substantial potential risk if the case was
 21 litigated successfully as well as additional litigation costs, and gives Plaintiffs a
 22 certain recovery without the expense, delay, or risks of further litigation.

23 **G. The Range of Reasonableness of the Settlement Fund in Light of**
 24 **the Best Possible Recovery and All the Attendant Risks of**
 25 **Litigation**

26 The last two factors ask whether the settlement is reasonable in light of the
 27 best possible recovery and the risk the parties would face if the case went to trial.
 28 *See Prudential*, 148 F.3d at 322. In this case, calculating the best possible

1 recovery for the class would be speculative at best, and the risks Plaintiffs face if
2 the case is tried are serious. As an initial matter, litigating this case through trial
3 will be an expensive, multi-year undertaking. Even if the parties are able to meet
4 the discovery challenges posed by this case, Plaintiffs' ability to certify the classes
5 for any purpose other than settlement is uncertain.

6 The Settlement Agreement, by contrast, offers the Proposed Class a definite
7 multi-million-dollar recovery. Plaintiffs will be spared the burden of additional
8 costs or expenses being deducted from any award they might receive, and they do
9 not need to await the outcome of an uncertain litigation. Instead, they will obtain
10 relief in a matter of months. All litigation is risky, and this litigation presents
11 numerous risks. The proposed settlement removes those risks and provides the
12 class with nearly immediate relief.

13 **V. THE PROPSOED NOTICE IS APPROPRIATE AND ADEQUATE**

14 **A. The Proposed Form of Notice Meets the Requirements of Rule 23**
15 **and Due Process**

16 Federal Rule of Civil Procedure 23(e)(1) provides that “[t]he Court must
17 direct notice in a reasonable manner to all class members who would be bound by
18 the proposal.” Plaintiff proposes providing individual, mailed notice to class
19 members to the extent practicable. A copy of the Proposed Notice of Proposed
20 Class Action Settlement is attached hereto as Exhibit 6. The Proposed Notice will
21 be posted on the internet and mailed prepaid first class postage.

22 Plaintiffs believe that the content and proposed method of dissemination of
23 the Proposed Notice fulfill the requirements of both Federal Rule of Civil
24 Procedure 23(e) and due process. *See generally Adams v. Southern Farm Bureau*
25 *Life Ins. Co.*, 493 F.3d 1276, 1285-88 (11th Cir. 2007). The Proposed Notice
26 apprises the Class of the material settlement terms and outlines the procedures and
27 related deadlines for any Putative Class Members who desire to exclude
28 themselves from the Settlement Agreement or object to the terms of the settlement.

1 The Proposed Notice also informs Putative Class Members of the date and place of
 2 the Final Approval Hearing. Further, the Proposed Notice advises the Class that,
 3 in connection with the approval of the proposed settlement, Class Counsel will ask
 4 the Court for attorneys' fees and reimbursement for already incurred out-of-pocket
 5 litigation expenses. Courts regularly grant requests for attorneys' fees and
 6 reimbursement of past expenses. *See e.g., In re Skilled Healthcare Group, Inc.*
 7 *Sec. Litig.*, No. CV 09-5416, 2011 WL 280991 (C.D. Cal. Jan. 26, 2011); *Cicero v.*
 8 *DirecTV, Inc.*, No. CV 07-1182, 2010 WL 2991486 (C.D. Cal. July 27, 2010).

9 The Proposed Notice is consistent with the notice program implemented in
 10 the *Adderley* Action subsequent to class certification and with other programs that
 11 this Court and others have found sufficient under Rule 23. *See, e.g., In re Network*
 12 *Associates Sec. Litig.*, 2001 WL 34135321, at *2 (N.D. Cal. Feb. 28. 2001)
 13 (approving notice by mail, paper publication, and posting on Internet); *In re U.S.*
 14 *Fin. Sec. Litig.*, 69 F.R.D. 24, 47 (S.D. Cal. 1975); *Hunt v. Check Recovery Sys.,*
 15 *Inc.*, 2007 WL 2220972, at *3 (N.D. Cal. Aug. 1, 2007) (finding that delivery by
 16 first class mail satisfies individual notice requirements); *In Re Wal-Mart Stores*
 17 *Inc., Wage & Hour Litig.*, 2008 WL 1990806 at *2 (N.D. Cal. May 5, 2008)
 18 (“notice by publication is only used when the identity and location of class
 19 members cannot be determined though reasonable efforts, which is not the case
 20 here since the identity and location of class members can be determined through
 21 reasonable efforts using Wal-Mart’s electronic records”). The Proposed Notice
 22 also satisfies the requirements of due process by alerting and informing the Class
 23 about the terms of the Settlement Agreement.

24 VI. **PROPOSED SCHEDULE OF EVENTS**

25 The [Proposed Order], filed concurrently herewith, sets forth a procedure
 26 and schedule for disseminating the Proposed Notice and for final approval of the
 27 proposed settlement. Class Counsel proposes the following schedule, which
 28 complies with the time periods set forth by the Ninth Circuit in *In re Mercury*

Interactive Corp., Sec. Litig., 618 F.3d 988 (9th Cir. 2010):

- (1) Within twenty (20) days after entry of a preliminary approval order: dissemination of Notice of Proposed Class Action Settlement to the Class via publication on the www.retiredplayersclassaction.com website and first class mail;
- (2) Thirty-five (35) days before the Final Settlement and Class Certification Hearing: deadline for submission of Class Counsel's motion for final approval of the Settlement Agreement and application for fees and expenses;
- (3) Twenty-one (21) days before Final Settlement and Class Certification Hearing: deadline to object to the Settlement Agreement; and
- (4) Seven (7) days before the Final Settlement and Class Certification Hearing: deadline for responses to any objections.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter the [Proposed] Order conditionally certifying the settlement class, preliminarily approving the proposed settlement, approving the proposed form and manner of notice of the settlement, and entering the proposed schedule or any other schedule that is satisfactory to the Court.

Dated: December 10, 2012

Respectfully submitted,

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By: /s/ Maxwell M. Blecher
Maxwell M. Blecher

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